

No. 48623-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**BRENDA ANN WING,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Supplemental Brief**

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**I. ISSUE**

- A. Did the miscalculation of Wing's offender score for Count II, Assault of a Child in the Third Degree make her plea unknowing and unintelligently entered?

**II. STATEMENT OF THE CASE**

The State relies on the Statement of the Case it submitted in its original response brief for the underlying facts and procedures. This Supplemental Response Brief is in response to Wing's Supplemental Brief that was filed after Danny Wing successfully won his appeal on an issue Wing did not raise in her original Response Brief. See COA Opinion 48143-0-II (2/28/2017). The State did not object to Wing raising the issue, as it would eventually be litigated, either here or during a personal restraint petition if the State were to prevail. The sole issue in the supplemental briefing is whether Wing's plea was involuntary due to her being incorrectly informed of her offender score on Count II, the Assault in the Third Degree.

The State will provide further substantive facts in its brief below as required.

### **III. ARGUMENT**

#### **A. WING MADE A KNOWING, INTELLIGENT, AND VOLUNTARY PLEA TO THE CHARGES, REGARDLESS OF HER OFFENDER SCORE TO COUNT III, ASSAULT OF A CHILD IN THE THIRD DEGREE.**

Wing argues her offender score was miscalculated, which thereby invalidates the voluntariness of her guilty plea because it was not an intelligent and knowing guilty plea. Wing's offender score was correctly calculated for the Manslaughter in the First Degree – Domestic Violence, Count I. Wing suffers no prejudice from the incorrect offender score for the Assault of a Child in the Third Degree, Count II, a count which was to run concurrent with the Manslaughter count. Wing's plea was knowing, intelligent and voluntary. This Court should affirm the plea and remand for a correction of the offender score in Count II: Assault of a Child in the Third Degree.

#### **1. Standard Of Review.**

This Court reviews the purpose and meaning of statutes de novo. *State v. Munoz-Rivera*, 190 Wn. App. 870, 884, 361 P.3d 182 (2015).

#### **2. Guilty Pleas Must Be Knowing, Intelligent, And Voluntary.**

Guilty pleas may only be accepted by the trial court after a determination of the voluntariness of the plea is made. CrR 4.2(d).

Due process requires that a defendant in a criminal matter must understand the nature of the charge or charges against him or her and may only enter a plea to the charge(s) voluntarily and knowingly. *State v. Robinson*, 172 Wn.2d 783, 790, 263 P.3d 1233 (2011) (citations omitted).

The court rule requires a plea be “made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea.” CrR 4.2(d). Prior to acceptance of a guilty plea, “[a] defendant must be informed of all the direct consequences of his plea.” *State v. A.N.J.*, 168 Wn.2d 91, 113-14, 225 P.3d 956 (2010) (citations and internal quotations omitted).

A defendant may be allowed to withdraw his or her guilty plea “whenever it appears that withdrawal is necessary to correct a manifest injustice.” *State v. Codiga*, 162 Wn.2d 912, 922-23, 175 P.3d 1082 (2008), *citing* CrR 4.2(f). “An involuntary plea can amount to manifest injustice.” *Codiga*, 162 Wn.2d at 923 (internal citation omitted). A miscalculation of an offender score, even one by mutual mistake that lowers the defendant’s standard range, renders the defendant’s plea involuntary and the plea may be withdrawn. *Id.* at 925.

**3. The Incorrect Offender Score For Count II: Assault Of A Child In The Third Degree Does Not Render The Plea Unintelligent Or Unknowing As That Count Was To Run Concurrent With The Other Counts.**

The State concedes that Wing's offender score for Assault of a Child in the Third Degree, Count II, was incorrectly calculated at six (6). The State agrees the correct offender score should be five (5). The State does not agree this error creates a manifest injustice that requires this Court to allow Wing the option of withdrawing her guilty plea. The incorrect score had no bearing or consequence on the plea as a whole, and this Court should look at the plea in total, not each count separately when determining if the incorrect offender score for Count II actually rendered Wing's plea involuntary.

Wing had no criminal history prior to pleading guilty in this matter. CP 177. Wing agreed in the Proffer Agreement to plead to six counts: Count I, Manslaughter in the First Degree; Count II, Assault of a Child in the Third Degree; Counts III and IV, Possession of a Controlled Substance; Counts IV and V, Witness Tampering. CP 27, 47. The offender score listed in the Proffer Agreement for Counts I and II was six. CP 47. The offender score listed for Counts I and II in the Statement of Defendant on Plea of Guilty was six and the remaining counts was five. CP 20.

In the Proffer Agreement Wing agreed to plead to Manslaughter in the First Degree, which had a standard range of 146 to 194 months with an offender score of six points. CP 46-48. The two Possession of a Controlled Substance counts, with an offender score of five, had a standard range of six plus to 12 months in prison. CP 19-20, 46-48. The two counts of Witness Tampering, with an offender score of five, had a standard range of 17 to 22 months. *Id.* The Assault of a Child in the Third Degree had an improperly calculated offender score of six, which put the standard range incorrectly at 22 to 29 months. *Id.* The correct standard range, with an offender score of five, would have been 17 to 22 months. RCW 9.94A.510; RCW 9.94A.515; RCW 9A.36.140.

The State acknowledges that generally a miscalculation of an offender score, including mutual mistake, renders a plea involuntary, even if it lowers the offender score. *Codiga*, 162 Wn.2d at 925. That is because there is no meeting of the minds. But that is not so in this case. All of Wing's counts were to run concurrent with each other. CP 22, 46-48. If Wing kept up her end of the Proffer Agreement she was looking at a minimum sentence of 146 months, regardless of the standard range for the Assault of the Child in the Third Degree count. CP 20, 46-48.



There is no conceivable way an improper calculation for the lesser count, which was to run concurrent with the greater charge of Manslaughter in the First Degree, could render Wing's plea unintelligent or unknowing. Wing understood she was looking at a minimum sentence of 146 months. Wing understood all of her counts were going to run concurrent. Wing understood if she did not follow through with the agreement the State could ask for anything up to the statutory maximum sentence, and for the greater charge, which was Manslaughter in the First Degree, that meant life in prison.

The purpose of allowing a defendant to withdraw their guilty plea, pursuant to CrR 4.2 and the case law which has spawned from it, is to protect a defendant and to ensure guilty pleas are only accepted after a defendant has made a competent and voluntary decision to plea. This decision must be made after a defendant is fully informed of all the consequences of the plea, both direct and indirect. Withdrawal of the plea is allowed to correct a manifest injustice when something goes wrong in this procedure that renders the plea unknowing or unintelligent and thereby involuntary. This did not happen in Wing's case. Wing understood the sentence she was facing, the faulty offender score on Count II had no consequence to the actual sentence Wing would serve. There is no manifest injustice

to correct. This Court should affirm the guilty plea and remand this case to correct the offender score for Count II: Assault of a Child in the Third Degree.<sup>1</sup>

#### **IV. CONCLUSION**

The incorrect offender score had no bearing on Wing's decision to plead guilty as there was no consequence of a lesser charge, with a lesser punishment, which was to run concurrent having a wrong offender score. This is not a manifest injustice and this Court should affirm Wing's guilty plea and sentence.

RESPECTFULLY submitted this 29<sup>th</sup> day of March, 2017.

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by: \_\_\_\_\_  
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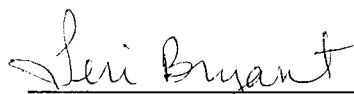
<sup>1</sup> The State acknowledges this Court rejected the same argument in *State v. Danny Allen Wing*, COA No. 48143-0-II (2/28/17). Nevertheless, the State stands by its argument.

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  BRENDA ANN WING,  Appellant.	No. 48623-7-II  DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 29, 2017, the appellant was served with a copy of the **Respondent's Supplemental Brief** by email via the COA electronic filing portal to Richard W. Lechich, Washington Appellate Project, attorney for appellant, at the following email addresses: [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org) and [richard@washapp.org](mailto:richard@washapp.org).

DATED this 29<sup>th</sup> day of March, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal  
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**LEWIS COUNTY PROSECUTOR**  
**March 29, 2017 - 3:29 PM**  
**Transmittal Letter**

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**Comments:**

No Comments were entered.

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